

## OBLIGATIONS OF GOOD FAITH IN PARTNERING OF UK CONSTRUCTION CONTRACTS

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### INTRODUCTION

With the increased incidence of partnering in the UK construction industry,<sup>1</sup> determining the significance of a partnering relationship and its impact on the obligations of the parties under English law is of critical importance. In practice, the nature of a partnering agreement varies and may be of a strategic or project-specific nature. However, what such relationships endeavour to do is agree key mutual objectives to which all parties subscribe, often including expressions such as a commitment to co-operation, teamworking or trust. The emphasis would appear to be on the establishment of a "commitment from all the partners at all levels to make the project a success. The result is that the partnering agreement drives the relationship between the parties rather than the contract document."<sup>2</sup>

Where partnering or strategic alliances have been successful, it is claimed that the legal status of such objectives is irrelevant: "Effective partnering does not rest on contracts...[these] should gradually become obsolete."<sup>3</sup> However, there are others who would disagree and who argue that in such relationships there is an even greater need for contractual clarity.<sup>4</sup> If recent anecdotal evidence of a partnering divide is more widespread, there would appear to be a difference between the rhetoric and the reality in some partnering experiences.<sup>5</sup> This is resulting in some partners becoming dissatisfied with such arrangements, particularly where the stronger bargaining power of their partners is driving cost reductions and reducing profit margins. Moreover, experience in Australia indicates the potential for fundamental problems to emerge in relation to disparities between the

1 Construction Industry Board (CIB) Working Group 12, *Partnering in the Team* (1997) Thomas Telford London.

2 CIB (1997) *supra*, note 1 at p 1.

3 J Egan, *Rethinking Construction*, The Report of the Construction Industry Task Force to the Deputy Prime Minister, John Prescott, on the scope for improving the quality and efficiency of UK construction, (1998) Department of the Environment, Transport and the Regions, London.

4 J Critchlow, *Making Partnering Work in the Construction Industry* (1998) Chandos Publishing Ltd, Oxford.

5 N Barrett, "Partnering Pitfalls being overlooked?" *Construction Law*, Vol 9, Issue 4, pp 137-138.

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parties' expectations in partnering alliances.<sup>6</sup> In some instances, partners are basing their claims on misrepresentation or the failure of the project to live up to their previous partnering experience.<sup>7</sup>

The legal status of such partnering agreements and objectives therefore is brought into question and so too, their influence (if any) on any co-existing contractual relationship, which frequently is under a separate construction contract. It is important to recognise that the objectives of partnering have for many years been met without recourse to documents<sup>8</sup> and that this very necessity for contracts has been questioned by Egan<sup>9</sup> more recently. However, a key issue is the potential for the emergence of obligations of good faith or co-operation, which reflect the spirit of partnering.<sup>10</sup> Whilst such objectives may be commendable partnering ideals, it is the interpretation of the meaning of such provisions that is critical and potentially unclear. Consequently, whether partnering of construction projects under English law will result in mutual expectations of the parties based on representations of co-operation and good faith warrants further analysis.<sup>11</sup>

### THE PARTNERING PHILOSOPHY

Bennett and Jayes define partnering as:

"A set of strategic actions which embody the mutual objectives of a number of firms achieved by co-operative decision-making aimed at using feedback to continuously improve their joint performance."<sup>12</sup>

However, partnering in construction is not a neatly defined concept. It can be merely an informal agreement that the parties will conduct their relationship with goodwill and co-operation or it may result in a longer-term contractual regime governing successive contracts.<sup>13</sup> In each case, though, the philosophy of partnering is the same, in essence one of mutual trust and co-operation. It demands as a prerequisite that the parties will work together towards the achievement of common aims. These may include joint objectives such as:

"To provide an environment in which [both parties] work co-operatively to optimise the

6 J Dorter, "Partnering—Think it through", *Building and Construction Law*, Vol 13, No 1, LBC Information Services, North Ryde, Australia, p 25.

7 Reference to Australian misrepresentation legislation.

8 His Honour Judge Humphrey Lloyd QC (1999) in observations on an early draft of this paper.

9 J Egan, *supra*, note 3 at p 33.

10 Latham recommends that "a specific duty to deal fairly with each other and with... subcontractors, specialists and suppliers, in an atmosphere of mutual co-operation" should be a feature of all modern construction contracts; Sir M Latham, *Constructing The Team* (1994) HMSO, London, p 37.

11 R Landsberg and P Megens (1996) "Applications of Good Faith in Contracting" [1996] ICLR 147 at p 187. According to Helps, this is a real concern which has developed recently in Australia (where partnering approaches are more firmly established) and have resulted in disputes based on misrepresentation. See D Helps "Why partnering is not a duty" in (1997) *Building*, 28 November, p 37.

12 J Bennett and S Jayes, *The seven pillars of partnering* (1998) Thomas Telford Publishing Ltd, London.

13 J Critchlow, *supra*, note 4 at p 5.

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...contracts to both parties; To provide an environment where the avoidance of disputes and conflicts is fundamental to the relationship between the parties; To programme and distribute the work as far as practicably possible throughout the year."<sup>14</sup>

"To design and construct a product to the optimum quality which is functional, flexible, maintainable and something of which we are proud; To understand each party's role within the project team and to build and maintain good relationships based on trust, respect and honesty; To have all parties co-ordinate actions to ensure project is completed on or before [the date for completion] ."<sup>15</sup>

"To deliver...to meet the expectations of all our customers...through teamwork within a trusting and open environment borne out of communication, co-operation and co-ordination; Our objectives: ...Profitability for all concerned; Complete on time, within budget and safely; Defects free; Right first time..."<sup>16</sup>

Thus, not only is partnering an approach to commercial dealing, it may also involve significant co-operative integration and interaction in a more practical way between employees of the partnering organisations. How then will such a relationship be interpreted? Although honesty between the parties might be expected, would this extend to positive co-operation such as supporting the other party financially to carry out their responsibilities?

It is this very difficulty in defining the parties' intentions in partnering that requires the existence of clear contractual arrangements.<sup>17</sup> Thus, it is recommended by some that such vague ideals of co-operation, trust and fairness should be omitted from the contractual agreement and left to a non-legally binding charter. The concern stems from the lack of certainty as to how such provisions might be interpreted by the courts, with the consequence that it might result in a fundamental change in the way in which parties are required to treat each other.<sup>18</sup> However, it could be argued that this is the very essence of partnering. The parties' intention is that they do treat each other in a fundamentally different way and through the partnering process they invest significant effort and resources to make the relationship work. The difficult question is what does this mean in practice? Is it feasible for such a vague concept to be enforced?

14 Extract from partnering aims between Staffordshire County Council and Edmund Nuttall Ltd cited in CIB Working Group 12, *supra*, note 1 at pp 42-43.

15 Extract from partnering charter between NatWest Property Holdings and Lovell Construction *et al.* Cited in CIB Working Group 12, *ibid.*, pp 31–35.

16 Extract from partnering charter between Sainsbury and partners on Ecostore development cited in J Bennett and S Jayes, *supra*, note 12 at p 23.

17 J Critchlow, *supra*, note 13 at pp 7–9; J Critchlow "We don't need a contract we're partnering" (1998) *Construction Law*, Vol 9, Issue 6, p 183; D Helps, *supra*, note 11; T Butcher, "Partnering: Contractual Considerations" in (1997) *Construction Law* Vol 8, Issue 3, p 79.

18 T Butcher, *ibid.*, at pp 81–82.

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### LONG TERM CONTRACTUAL RELATIONSHIPS AND THE LAW

Campbell and Harris would suggest that partnering, typical of a long-term or relational contract, is analogous to a partnership.<sup>19</sup> However, whereas in legalised partnerships, the parties would be expected not to exploit their individual self-interest at the expense of the partnership, the partnering philosophy appears to demand the same commitment but without placing any duty or obligation on the parties to do so.<sup>20</sup> This failure adequately to recognise what is being partnered (the parties' relationship and conduct or the contract itself) has resulted in the recent Australian disputes referred to above.

It therefore remains to be considered whether in the context of a relational, essentially co-operative contract, there is the potential for the implication of a good faith requirement. Adams and Brownsword and others have suggested that the "doctrine of good faith is commonly seen as the most direct way of importing into contract law the idea of cooperation. Indeed, good faith is often equated with an implied term of co-operation".<sup>21</sup> Thus, in the context of a commercial relationship based on mutual trust and co-operation, it would seem highly desirable and in some circumstances necessary for such obligations to be enforced and upheld by the courts. Eisenberg<sup>22</sup> would agree with this proposition and considers that the law should embrace the following approaches to take account of the parties' intentions in a relational contract:

- Rules that would impose on parties to a relational contract a broad obligation to perform in good faith.
- Rules that would give content to particular kinds of contractual provisions that may be expressed or implied in relational contracts such as best-efforts clauses or a unilateral right to terminate at will.
- Rules that would treat relational contracts like partnerships, in the sense that such contract involve a mutual enterprise and should be construed in that light.
- Rules that would impose upon parties to a relational contract a duty to bargain in good faith to make equitable price adjustments when changed circumstances occur, and would perhaps even impose upon

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<sup>19</sup> D Campbell and D Harris "Flexibility in Long-Term Contractual Relationships: The Role of Co-operation", (1993) 20 *Journal of Law and Society*, No 2, at p 167.

<sup>20</sup> This failure adequately to recognise what is being partnered has resulted in recent disputes in Australia where the partnering project has failed to live up to the expectations of one party. See JB Dorter, "Partnering: Think it Through" (1997) *Arbitration* 63(3) August at pp 210–211.

<sup>21</sup> J Adams and R Brownsword *Key Issues In Contract* (1995) Butterworths, London, at p 303; EA Farnsworth "Good Faith Performance and Commercial Reasonableness under the Uniform Commercial Code" (1962–63) 30 *Univ. of Chicago Law Review* 666; JF Burrows "Contractual Co-operation and the Implied Term", *Modern Law Review*, Vol 13, p 390.

<sup>22</sup> MA Eisenberg, "Relational Contracts" in J Beatson and D Friedmann, *Good Faith and Fault in Contract Law* (1995) Clarendon Press, Oxford at p 298.

If, as Rakoff argues, in the implication of terms judges are endeavouring to carry out the intentions of the parties,<sup>23</sup> then the philosophy of partnering suggests that the implication of a good faith obligation should be considered.

### THE CONCEPT OF GOOD FAITH

There is no general obligation of explicit good faith in English contract law<sup>24</sup> other than a duty not to engage in fraudulent conduct.<sup>25</sup> Instead, the courts place restraints on the parties' behaviour by means such as implied terms or remedies.<sup>26</sup> In a construction context, these restraints are somewhat extensive in their scope and depth. Indeed, the relational aspects of construction contracts are reflected in the upholding of implicit good faith obligations of both a positive and negative nature, which are consistent with duties of good faith in other jurisdictions.<sup>27</sup> As a consequence, the courts will restrict instances of abuse of discretionary power and will uphold positive obligations to co-operate or provide assistance. The basis for the imposition of such obligations is the intentions or reasonable expectations of the parties based on the contract and the surrounding circumstances. In each case, it is the bargain made which is to be upheld. In the context of partnering of construction contracts, therefore, it is suggested that the reasonable expectations of the parties are heightened beyond obligations within standard construction contract arrangements, which the courts therefore should uphold.

Certainly in recent decisions the courts have displayed greater recognition of the concept and in specific instances have been supportive of exploring the imposition of good faith obligations through implied terms<sup>28</sup> (both in fact and law<sup>29</sup>). However, there is a difference between exploration and positive application of the concept and so there is merit in analysing further, judicial developments in relation to contract performance and formation, to see if this recognition has wider applicability.

23 TD Rakoff "The Implied Terms of Contracts: Of Defaults Rules and Situation Sense" in J Beatson and D Friedmann *Good Faith and Fault in Contract Law* (1995) Clarendon Press, Oxford at p 192. See also MA Eisenberg, "Relational Contracts" in J Beatson and D Friedmann, *ibid.*, at p 298.

24 *London Borough of Merton v. Stanley Hugh Leach Ltd* (1985) 32 BLR 51 per Vinelott J at p 80.

25 M Furmston, T Norisada and J Poole, *Contract Formation and Letters of Intent* (1998) John Wiley & Sons, Chichester at p 269.

26 *Interfoto Picture Library Ltd v. Stiletto Visual Programmes Ltd* [1989] 1 QB 433, per Bingham LJ at p 439.

27 B Colledge, "Good Faith in Construction Contracts—The Hidden Agenda" (1999) 15 Const LJ No 3, Sweet & Maxwell Ltd.

28 *Interfoto Picture Library Ltd v. Stiletto Visual Programmes Ltd* [1989] 1 QB 433; *Philips Electronique Grand Public SA v. British Sky Broadcasting* [1995] EMLR 472; *Timeload Ltd v. British Telecommunications plc* [1995] EMLR 459 (CA); *Balfour Beatty Civil Engineering Ltd v. Docklands Light Railway* (1996) 78 BLR 42.

29 *Renard Constructions (ME) Pty Ltd v. Minister for Public Works* (1992) 26 NSWLR 234 per Priestly JA. (Referred to in text as *Renard*).

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### Developments in relation to contract performance

Support for upholding a principle of good faith in contract performance has been developing in the Australian courts over recent years. In *Renard Constructions v. Minister for Public Works*,<sup>30</sup> in deciding whether there should be an implied term in fact and law relating to a duty to act reasonably in the use of a discretionary power (here the exclusion of a contractor from the site), Priestly JA like Bingham J in *Interfoto*<sup>31</sup> drew parallels with notions of good faith and considered that these would, in due course, be more explicitly recognised by the courts in Australia.<sup>32</sup> Thus, he concluded that the expected standard, consistent with prevailing community expectations, is a duty of good faith and fair dealing in the performance of contracts.<sup>33</sup>

Priestly JA held<sup>34</sup> therefore that there was an implied term (in fact and law) of a duty to act reasonably in the use of this power which arose (i) to give business efficacy to the contract; (ii) as a necessary incident of the class of contract<sup>35</sup>; and (iii) because "contracts generally were subject to an implied obligation that they should be performed in good faith". Handley JA, however, whilst supporting Priestly JA, adopted the view of necessity for restraint on the exercise

of power and held that the decision to exclude the contractor was objectively unreasonable and therefore involved invalid exercise of power.<sup>36</sup> Thus, in *Renard*, Priestly JA appears to be of a similar opinion to Bingham J in *Interfoto* (that implicit good faith is upheld by the courts) but extends this position in this case to what is in effect an enforcement of good faith. Another key fact that emerged is that the nature of the contract itself was important in establishing the obligation, i.e. that it was a complex construction contract.

Similar issues relating to the use or abuse of a discretionary power of termination were considered by Bingham LJ in *Timeload Ltd v. Telecommunications plc*.<sup>37</sup> Here, the case was not a construction contract but concerned the attempted termination by British Telecommunications (BT) of a telephone line contract with Timeload. Bingham LJ extended reference to good faith and solutions to unfairness and further suggested that statutory general principles of fairness (here the Unfair Contract Terms Act) might be used as a guide by the courts in determining expected standards of fairness in circumstances where the statute does not apply.<sup>38</sup> This would have resulted in

30 *Ibid*.

31 *Interfoto Picture Library v. Stiletto Visual Programmes Ltd* [1989] 1 QB 433.

32 *Supra*, note 30 at p 38.

33 *Ibid*, at p 43.

34 Meagher JA dissenting. See IND Wallace *Hudson's Building and Engineering Contracts*, 11th edn (1995) Vol 2, Sweet & Maxwell, London, paras 12-026/027 at pp 1261-1262.

35 That is a contract to build work of some size and the contract for which provides for a number of eventualities.

36 This duty of reasonableness in the exercise of this discretionary power was followed in *Hughes Bros . Pty Ltd v. Trustees of the Roman Catholic Church for the Archdiocese of Sydney* (1993) 31 NSWLR 91.

37 *Timeload Ltd v. British Telecommunications plc* [1995] EMLR 459 (referred to in text as *Timeload* ).

38 *Supra*, note 37 at p 8.

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the courts giving more explicit recognition to good faith principles. Ultimately, the statute was held to be applicable so this issue was left unresolved. An injunction was granted to restrain BT from what would have been an abuse of the termination powers.

Additionally, the judgment provides support for an implicit concept of good faith and highlights significant relevant issues which influence the courts' decisions: the background circumstances,<sup>39</sup> the nature of the parties,<sup>40</sup> the type of relationship<sup>41</sup> and the intentions or reasonable expectations of the parties.<sup>42</sup>

Further development of the good faith principle is evident in *Philips Electronique Grand Public SA v. British Sky Broadcasting*.<sup>43</sup> Here, the contract in question between BSB and Philips was for the manufacture by Philips of satellite television receivers and the continuation of a capacity for manufacture for just over a period of two years. Prior to the end of the contract, BSB merged with Sky because of a collapse in their market due to competition from Sky. This resulted in Philips being left with unsold stock, unneeded manufacturing capacity and no continuing opportunity to sell receivers. What fell to be considered was whether BSB had breached any implied terms that would enable Philips to recover some of the loss incurred. Bingham LJ, in deciding not to uphold any implied terms, stated:

"For the avoidance of doubt we would add that we would, were it material, imply a term that BSB should act with good faith in the performance of this contract. But it is not material."

This explicit recognition of a good faith obligation has been described as a "doctrinal watershed"<sup>44</sup> and suggests that the shift towards acceptance in English law has occurred. However, it is important to clarify the nature of the implied good faith obligation that here would have been implied. Does a general obligation of good faith exist in commercial dealings, in accordance with community expectations<sup>45</sup> or is something much narrower contemplated, which restricts opportunistic behaviour?<sup>46</sup> The courts' approach can be determined from the finding that BSB did not act in bad

39 The terms of a licence document governing BT's operations, although not forming part of the contract with Timeload, were considered by Bingham to be "an inescapable part of the background which falls to be considered".

40 The nature of the BT company (i.e. a privatised but dominant, closely regulated public

supplier) influenced Bingham's views.

41 The classical approach to the implication of terms was questioned by Bingham LJ as not necessarily being appropriate given the nature of the BT company and services. He was suggesting that an implied term may result as a general rule in contracts of this type.

42 The intentions of the parties were also considered by Bingham LJ who stated that "the courts must be wary of accepting a construction which so obviously flies in the face of what one party at least may be taken to have intended".

43 *Philips Electronique Grand Public SA v. British Sky Broadcasting* [1995] EMLR 472 (referred to in text as *Philips*).

44 R Brownsword, "Good Faith in Contracts' Revisited" (1996) *Current Legal Problems*, Vol 49, Part 2, Oxford University Press, 111 at 123.

45 *Renard Construction v. Minister for Public Works supra* note 30.

46 Such as Handley JA might subscribe to in *Renard; supra*, note 30.

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faith and further that no reliance was placed on any more than an extended concept of good faith.<sup>47</sup> Thus, it is clear that the focus was on a narrow definition of good faith, one of honesty and fair dealing, which limits opportunistic behaviour in bad faith. This might mean a deliberate or intentional act to undermine Philips, for example, rather than for sound commercial reasons, to protect the market share and save their business. Certainly, as Wallace<sup>48</sup> indicates, this restraint on self-interested opportunistic behaviour is applied under the doctrine of good faith in the United States and many civil law countries. Consequently, it is a negative expression of good faith rather than a positive obligation to co-operate or promote the joint interests of the parties.

Additionally, no further reliance was evident and thus, in accordance with the parties' intentions, it was not clear that the concept of good faith in this case should go any further. However, what might occur if there has been reliance on a more positive expression of good faith? For example, an obligation on the determining party to pay a compensatory sum to the other in the event of self-interested termination. Or alternatively, an obligation not to enter into other commercial dealings which would adversely affect the existing commercial arrangement. Might these be capable of implication? This is particularly important in relation to determining whether an obligation of good faith in partnering might be implied. The court would need to consider whether there has been reliance on such an obligation, whether it was the parties' intentions or whether it was evident from the nature and circumstances of the transaction. It is clear that the courts will adopt standard approaches to the implication of terms.<sup>49</sup>

However, such an approach can be misleading. The very absence of express terms means that the courts are attempting to determine what the parties have failed to provide as a result of an oversight or deliberate action. As a consequence, it is more difficult for the courts to identify the parties' intentions.<sup>50</sup> Hence, it is the courts' role to limit terms to those which are necessary to give efficacy to the contract.<sup>51</sup>

In the *Philips* case, the parties' intentions regarding compensation in the event of a commercial flop were unclear. This may be the case in contracts of a complex, novel or long-term nature. Hence, the only good faith reliance intended in *Philips* was the duty not to evade the bargain by bad faith. Bingham questions whether BSB, in forming the agreement, would have been willing to circumscribe its commercial freedom to the extent of not

47 At p 6F of the transcript of judgment of 1 March 1993.

48 IND Wallace *supra*, note 34 para 12-029 at pp 1263-1264.

49 *BP Refinery (Westernport) Pty Ltd v. President, Councillors and Ratepayers of Shire of Hastings* (1978) 52 ALJR 20 per Lord Simon of Glaisdale at p 26 summarising the approach; (i) it must be reasonable and equitable; (ii) it must be necessary to give business efficacy to the contract so that no term will be implied if the contract is effective without it; (iii) it must be so obvious that "it goes without saying"; (iv) it must be capable of clear expression; (v) it must not contradict any express term of the contract.

50 Bingham LJ in *Philips Electronique Grand Public SA v. British Sky Broadcasting supra*, note 43.

51 *Reigate v. Union Manufacturing Co (Ramsbottom) Ltd* [1918] 1 KB 592 as per Scrutton LJ at p 605.

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committing any act which would impede or render the television receivers useless or unmarketable. Thus, contractual freedom is held to be the parties' intentions here, limited only by the general standards of decency or honesty, of not operating in bad faith. This echoes the approach in *Mona Oil Equipment & Supply Co Ltd v. Rhodesia Railways Ltd*<sup>52</sup> and *Himbleton Pty Ltd v. Kumagi (NSW) Pty Ltd*,<sup>53</sup> where the degree of co-operation to be implied was held to be dependent on the intentions of the parties as defined by reference to the contract. So, in order to uphold a positive, rather than negative, obligation of good faith, it is the parties' intentions, or rather their reasonable expectations, which are paramount.<sup>54</sup>

In summary, it is apparent that the courts have in recent decisions moved significantly toward explicit recognition of an implied obligation of good faith in the performance of contracts. In doing so, they have adopted similar criteria for determining whether an implication exists. These rely heavily on the parties' intentions but also relate closely to the nature of the contractual relationship<sup>55</sup> and its background, prevailing community expectations or reasonable commercial standards including honesty or fair dealing and whether there is sufficient certainty over either the construction of the express terms<sup>56</sup> or the intentions of parties where a term is to be implied. The courts' role is not to decide whether the bargain is good or bad; it must give fair effect to what the parties have agreed.<sup>57</sup> However, where the result leaves one party vulnerable to opportunistic behaviour, the courts will place restraints on freedom to contract.<sup>58</sup> In this regard, it has been suggested that the courts would wish to consider whether a person, invested with the power to rule on his own and the other party's rights and obligations, was not subject to a duty of good faith substantially more demanding than that customarily recognised in English contract law. Whether this in reality was no more than an obligation to act honestly, fairly and reasonably is questionable.

Consequently, it would appear that good faith principles are being considered implicitly by the courts but that in certain circumstances an

<sup>52</sup> *Mona Oil Equipment & Supply Co Ltd v. Rhodesia Railways Ltd* [1949] 2 All ER 1014 at p 1018.

<sup>53</sup> *Himbleton Pty Ltd v. Kumagi (NSW) Pty Ltd* (1991) 29 NSWLR 44.

<sup>54</sup> Similar issues of positive co-operation were considered in *RDJ International Pty Ltd v. Preformed Line Products (Australia) Pty Ltd* (1996) 39 NSWLR 417, where the duty, whilst not extending as far as good faith, could be imposed to give effect to the common intentions of the parties. It did not matter in *RDJ* that the breach was not one of a capricious nature.

<sup>55</sup> See also *Elliott v. Wheeldon* (1992) *The Times Law Reports* 12 March, 114 which held that where two parties entered a joint venture through a company (with one party guaranteeing the company's liabilities) the other party owed a duty to conduct himself in such a way as not to increase the other party's liabilities except in good faith.

<sup>56</sup> See for example *Workshop Tarmacadam Co Ltd v. Hannaby and Others* (1995) LEXIS where an express term relating to measurement on completion was held to be too vague and uncertain to be enforceable.

<sup>57</sup> See for example *Hillas & Co Ltd v. Arcos Ltd* (1932) 147 LT 503, 514; *Liverpool City Council v. Irwin* [1977] AC 239 at 262 (HL); *Trollope & Colls Ltd v. North West Metropolitan Regional Hospital Board* [1973] 1 WLR 601 at 609 (HL).

<sup>58</sup> See J Cartwright, *Unequal Bargaining — A Study of Vitiating factors in the Formation of Contracts* (1991) Clarendon Press, Oxford, pp 230–231; also Bingham MR in *Balfour Beatty v. Docklands Light Railway* (1996) 78 BLR 42 at pp 57/58.

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explicit duty of good faith may be enforced. Next, judicial developments in relation to good faith at contract formation/negotiation will be reviewed to inform the directional shift in relation to contractual performance.

#### **Developments in relation to contract formation and negotiation**

As with contract performance, the recognition of implicit good faith obligations in relation to contract negotiations is apparent and it is suggested that the courts are moving towards a more explicit recognition of the concept. However, there is concern generally regarding the extent to which the courts should intervene in the freedom to negotiate, which is, in essence, an adversarial process.

The courts appear reluctant to enforce contracts where there is lack of certainty as to the parties' intentions.<sup>59</sup> These concerns have been used as a basis for rejecting the imposition of good faith obligations.<sup>60</sup> However, where there is certainty, such agreements will be upheld.<sup>61</sup> As McKendrick<sup>62</sup> indicates, the courts should seek to uphold the parties' intentions including an express agreement to negotiate in good faith. But, enforceability will depend on express terms as construed from the contract. Where these are too illusory, vague or uncertain they will not be upheld.<sup>63</sup> Difficulties arise where there is a range of potential solutions to fill the gap in the contract term.<sup>64</sup> Moreover, the actions of the parties may negate the upholding of a good faith obligation.<sup>65</sup> Equally, their relative bargaining positions may impact on the imposition of such a duty.<sup>66</sup>

Overall, the difficulty in upholding agreements with express terms of good faith appears to be a lack of certainty about what this means in concrete terms or how to translate this into action of the parties. In principle, the courts have expressed support for upholding obligations "to negotiate in good faith"<sup>67</sup> or to "use best endeavours to negotiate".<sup>68</sup> Where obligations are defined more

<sup>59</sup> *Walford v. Miles* [1992] 2 AC 128 at p 138.

<sup>60</sup> *Ibid*, at p 39.

<sup>61</sup> *Pitt v. PHH Asset Management Ltd* [1993] 4 All ER 961.

<sup>62</sup> E McKendrick, "The Regulations of Long Term Contracts" in J Beatson and D Friedmann *supra*, note 23 at p 321.

<sup>63</sup> *Coal Cliff Collieries Pty Ltd v. Sijehama Pty Ltd and Another* (1991) 24 NSWLR 1; *Australia Media Holdings Pty Ltd and Others v. Telstra Corp Ltd and Others, Australia Media Holdings Pty Ltd and Others v. News Corporation Ltd* (1998) 43 NSWLR 104.

<sup>64</sup> *Coal Cliff Collieries Pty Ltd v. Sijehama Pty Ltd and Another supra*, note 63 at pp 27-28.

<sup>65</sup> *GSA Group Pty Ltd and Others v. Siebe plc and Others* (1993) 30 NSWLR 573 per Rogers CJ Comm D at pp 580-581.

<sup>66</sup> *Hughes Aircraft Systems International v. Airservices Australia* (1997) 146 ALR 1 where inequity of bargaining power may have been an indirect issue given that the defaulting party was a public company. Here a duty was upheld; *GSA Group Pty Ltd and Others v. Siebe plc and Others* (1993) 30 NSWLR 573 where it was held that the court "should not import into a contract between commercial parties of equal bargaining power an obligation of good faith and fairness in the performance of the contract".

<sup>67</sup> P Kirby, *Coal Cliff Collieries Pty Ltd v. Sijehama Pty Ltd* (1991) 24 NSWLR 1 at 25; Lord Wright, *Hillas & Co Ltd* (1932) 147 LT 503 at 515.

<sup>68</sup> *Walford v. Miles* [1992] 2 AC 128 per Lord Ackner following discussions of *Channel Home Centres v. Grossman* 795 F 2d 291 (3d Cir 1986).

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precisely, such as in lock-out agreements, the courts are able to apply standard tests to the circumstances to establish whether to uphold the agreement. Conduct which is shown to constitute unfair dealing is likely to amount to a breach, which suggests that fairness is being equated to honesty and lack of bad faith.

However, despite this, a duty to negotiate in good faith is considered to be unworkable in English law<sup>69</sup> particularly because a contract to negotiate is considered to be too uncertain in a similar way to a contract to enter into a contract.<sup>70</sup> What this review indicates is the courts' willingness to uphold obligations of good faith in negotiation or contract formation where the obligation accords with the parties' intentions and, in relation to express terms of good faith, where these are sufficiently certain to give them meaning. The courts have found it easier to uphold a negative obligation (such as dishonesty, corruption, abuse of discretionary power) than those requiring a positive duty of co-operation.

However, the critical factor in determining this obligation is certainty, for the courts are resistant to completing the bargain for the parties where their intentions lack clarity or certainty. In many cases reviewed, the nature of the agreements is too imprecise to determine meaning.<sup>71</sup> This lack of certainty is less likely to be an issue where a negative duty is to be imposed. The courts appear to be able to translate the parties' expectations by applying objective standards of decency, honesty and reasonableness to determine whether a duty should be upheld. Similarly, in the case of positive duties, the courts will adopt an objective stance but on a more subjective analysis of reasonable intentions or expectations. Thus, the preferred outcome or reasonable expectation of the parties is sometimes less certain and often vague. Where this is the case, the courts appear reluctant to intervene if the imposition of a duty would lead to placing an onerous burden on one of the parties (where there is reasonable doubt that this was contemplated). It is not unreasonable to expect gaps in contract planning in circumstances where the commercial relationship is intended to be extensive, long-term and relational in nature. Consequently, it could



be argued that the function of the law and the role of the courts are to determine ways to complete these gaps where the circumstances demand, using objective standards of reasonableness and fair dealing as a starting point. In reality, this would appear to be the courts' approach to construction contracts and in the developing law related to explicit good faith. Thus, the courts appear to be adopting the principles of good faith as an exception, in the rare cases where circumstances demand it.

69 *Ibid.*, at p 38.

70 *Courtney & Fairburn Ltd v. Tolaini Bros (Hotels) Ltd* [1975] 1 All ER 716 at [1975] 1 WLR 297; *Walford v. Miles* [1992] 2 AC 128.

71 For example, Lord Ackner, *Walford v. Miles* [1992] 1 All ER 453, [1992] 2 AC 128 "There can be no obligation to continue to negotiate until there is a 'proper reason' to withdraw. Accordingly, a bare agreement to negotiate has no legal content".

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### THE PARTNERING AGREEMENT AND GOOD FAITH

Unlike the United States, partnering in the United Kingdom does not automatically involve an implied covenant of good faith.<sup>72</sup> In order to establish the potential for good faith obligations in partnering, the nature of the agreement between the parties and the context in which this operates need to be analysed further.

Partnering might be introduced at two levels, project-specific or strategic. Although, the duration of the partnering arrangement, such as a strategic arrangement, may be of significance in establishing customary trading practices,<sup>73</sup> it is submitted that it is the precise terms of the documents which define the relationship that are critical to determining a good faith obligation as well as the context in which this operates. Consequently, the familiar techniques of construction of the contract, express terms and implication of a term will be adopted to investigate the existence and enforcement of good faith obligations.<sup>74</sup>

#### Construction of the contract—Interrelationship of the contract and charter

The interrelationship of the contract and charter is of critical importance in the determination of obligations of good faith. It is the contract which governs the parties' relationship and it is from this that obligations derive. Where partnering obligations are expressly contained in the contract or incorporated by reference, then the position is clear. These express terms will be construed in the usual way and are discussed later in this article. However, the status of the charter, where not incorporated expressly, is of a document which lies outside the contract terms and therefore strictly is not to be considered in determining the extent of obligation. Thus, it may be concluded that the subsequent contract is a full and sufficient expression of the commercial relationship<sup>75</sup> with evidence of pre-contract negotiations being excluded<sup>76</sup> or any subsequent charter agreement (or parties' conduct) having no bearing on the pre-existing contract.<sup>77</sup> Whilst this construction

72 Associated General Contractors of America "Partnering: A concept for success" (1991) Washington DC that explains partnering as "not a business contract but a recognition that every business contract includes an implied covenant of good faith", in RJ Stephenson *Project Partnering for the Design and Construction Industry* (1996) John Wiley & Sons Inc., New York at p 116.

73 See AG Guest, *Chitty on Contracts* 27th edn (1994) Vol 1 "General Principles", Sweet & Maxwell, London paras 12-010 and 13-014-016; MP Furmston, *Cheshire, Fifoot & Furmston's Law of Contract*, (1996) Butterworths, London at p 136.

74 JW Carter and MP Furmston, "Good Faith and Fairness in the Negotiation of Contracts Part 1" (1994) 8 *Journal of Contract Law* 1 at p 3.

75 *Trollope & Colls Ltd v. Atomic Power Constructions Ltd* [1962] 3 All ER 1035.

76 *Prenn v. Simmonds* [1971] 3 All ER 237.

77 *Schuler AG v. Wickman Machine Tool Sales* [1974] AC 235. See MP Furmston *supra*, note 73 at pp 126-130 for further discussion of parol evidence rule.

would appear logical and correct, an anomaly arises in practice when the commercial relationship is analysed. That is, given that the charter is intended to influence the parties' actions in some way, it is only reasonable to conclude that the parties' actions (and also their expectations of each other) in a partnering context must differ from a traditional construction contract approach without the partnering commitment. The difficulty is, determining in what way.

For clarity, if the parties do not intend to be legally bound by the partnering charter then they should state this explicitly in the charter.<sup>78</sup> As such, the document will do no more than represent the parties' intent or aspirations and will not result in unintended impact on their actions under the contract. In some ways, a parallel may be drawn here with International Framework Agreements, which merely provide a mechanism for continuing commercial discussions or facilitating tendering processes.<sup>79</sup>

Consequently, if the legal effect is left unclear, the parties may discover that the document is interpreted as a collateral contract,<sup>80</sup> or inadvertently incorporated by reference into the express contract terms. Alternatively, the charter may be considered as part of the surrounding circumstances in order to ascertain the parties' reasonable expectations in the construction of the contract,<sup>81</sup> particularly where the express terms lack clarity.

However, in the absence of express terms of good faith in the contract, whether good faith obligations will be upheld in the context of traditionally detailed and complex construction contracts is less certain.<sup>82</sup> In this respect, the agreement will be construed by the courts according to classical principles consistent with the reasonable expectations of the parties, the presumption being that the construction contract is intended to contain all the terms of the bargain. However, as stated by Lord Russell of Killowen CJ:

"it is a presumption only, and it is open to either of the parties to allege that there was, in addition to what appears in the written agreement, an antecedent express stipulation not intended by the parties to be excluded, but intended to continue in force with the express written agreement...."<sup>83</sup>

78 T Butcher *supra*, note 17.

79 See for example the definition of a framework agreement in the EU Utilities Directive: "An agreement between a contracting authority and one or more suppliers or contractors, the purpose of which is to establish the terms, in particular, with regard to the prices and, where appropriate, the quantity envisaged, governing the contracts to be awarded during a given period." cited in J Critchlow *supra*, note 4 at p 30.

80 For example, *City and Westminster Properties (1934) Ltd v. Mudd* [1959] Ch 129; *Esso Petroleum Co Ltd v. Mardon* [1976] 2 All ER 5.

81 *Timeload Ltd v. British Telecommunications plc* *supra*, note 37 where the terms of a licence agreement governing BT's operations were looked at as "an inescapable part of the background which falls to be considered" even though it did not form part of the express terms of the contract.

82 J Critchlow *supra* note 4; T Butcher (1997), *supra*, note 17; D Helps (1997), *supra*, note 17; R Landsberg and P Megens (1996), *supra*, note 11 at p 187. In addition, some lawyers recommend that the partnering charter should contain a "without prejudice" clause.

83 Lord Russell of Killowen CJ in *Gillespie Bros & Co v. Cherney, Eggar & Co* [1896] 2 QB 59 at 62 cited in HG Beale; WD Bishop, MP Furmston, *Contract Cases & Materials*, 2nd edn (1990), Butterworths, London, Edinburgh at p 281.

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To the extent that a good faith obligation is upheld, it will arise not as a rule, but as an exception.<sup>84</sup>

It could be argued that the parties' intentions and reasonable expectations are that they will comply with the charter and that this will influence the actions of the parties under the express terms of the contract. To this extent, it is suggested that obligations of good faith may arise from the interrelationship between the contract and charter, subject to the courts being able to establish with certainty the necessities of the contract.<sup>85</sup> The agreement to partner is in itself evidence of a long-term or relational relationship.<sup>86</sup> As such, it provides an agreed statement of the parties' intentions that may be significant in the interpretation of contract terms. For example, the charter terms are often of a type which, if adhered to, will affect significantly the way in which the parties carry out their contractual obligations. Consider the following extract from the partnering charter highlighted earlier:

"To provide an environment in which [both parties] work co-operatively to optimise the ... contracts to both parties; ...To programme and distribute the work as far as practicably possible throughout the year."<sup>87</sup>

Under a long-term maintenance contract for example, such a term might well impact on the extent and timing of work made available by the client. It could be argued that there would be an obligation on each party to plan and programme the work using their best endeavours to minimise unnecessary cost to each other (e.g. due to inefficient working or uneconomical sequencing of work) if it is clear that this could be avoided. That is, might not each party be under an obligation to select the option which is most advantageous to their joint interests? Where this is not possible and one party stands to gain, should not the parties be under an obligation to discuss or consider alternative approaches to minimise expenditure? This may seem too controversial and at odds with commercial freedom; however, it is within reasonable contemplation that parties might stand to gain more from such an approach, than from a more precise and adversarial stance. The difficulty of course is the way in which such a relationship is documented and the sometimes lack of consistency between the charter, the parties' actions and the contract terms.

In practice, the way in which the parties interact together under a contract

84 This exception model accords with one of restrained self-interest in which "the general rule licenses contractors to deal in a wholly self-interested manner and in which a party's legitimate interests function as constraints on the licensed pursuit of self-interest". See R Brownsword, "Two Concepts of Good Faith" (1994) 7 *Journal of Contract Law*, No 3, September, 197.

85 *Mona Oil Equipment & Supply Co Ltd v. Rhodesia Railways Ltd* [1949] 2 All ER 1014; *Himbleton Pty Ltd v. Kumagi (NSW) Pty Ltd* (1991) 29 NSWLR 44; *Philips Electronique Grand Public SA v. British Sky Broadcasting* [1995] EMLR 472.

86 See IR Macneil "The Many Futures of Contracts" (1974) 47 *Southern California LR* 691 for discussion of classical, neo-classical and relational contracts.

87 Extract from partnering aims between Staffordshire County Council and Edmund Nuttall Ltd cited in CIB Working Group 12 *supra*, note 1 at pp 42-43.

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which is also partnered can be (but is not always) significantly different to the nature of interaction in the absence of partnering. Consider the following examples of typical partnering approaches:

- The incidence of combined team "away days" to foster the development of the team's collective understanding and shared objectives.
- Greater reliance on co-operation between the parties evidenced for example by enhanced discussion of problems which arise and an emphasis on finding shared solutions.
- The development of a combined team spirit through the sharing of site office accommodation and the joint use of logos on site transport and clothing.
- The commitment to an "open book" accounting method for the verification of costs and expenditure.

Through such actions, it might be argued that the intention of the parties is for the partnering charter to inform the performance of the contract, whether the charter is entered into prior to, during or at the same time as the contract. Whilst, there would have to be clear evidence to this effect to fulfil the necessary rules of construction, it would seem reasonable that such actions demonstrate the intent to differ from a more traditional construction contract arrangement. It might be arguable that there is a "common understanding which is to be derived from the conduct of the parties"<sup>88</sup> and therefore that "the judicial task is not to discover the actual intentions of each party; it is to decide what each was reasonably entitled to conclude from the attitude of the other".<sup>89</sup> Thus, as in *Jacobs v. Batavia and General Plantations Trust Ltd (1924)*,<sup>90</sup> where a prospectus was admissible, might not the partnering charter be admissible also, particularly where it is entered into prior to the contract itself? As the 1986 Law Commission Report No 154 highlights, "there is no rule of law that evidence is rendered inadmissible or is to be ignored solely because a document exists which looks like a complete contract. Whether it is a complete contract depends upon the intention of the parties, objectively judged, and not on any rule of law."<sup>91</sup> What the impact of the charter might be on the performance obligations will then be dependent on the nature of the terms of both the charter and the contract and will arise as a result of the construction of express or implied terms. These will be considered next.

88 Lord Denning MR in *British Crane Hire Corp Ltd v. Ipswich Plant Hire Ltd* [1974] 1 All ER 1059 CA.

89 Lord Reid in *McCutcheon v. David MacBrayne Ltd* [1964] 1 All ER 430 quoting from the Scottish Textbook *Gloag on Contract* cited by Lord Denning MR, *ibid* .

90 *Jacobs v. Batavia and General Plantations Trust Ltd* [1924] 1 Ch 287, *aff'd* [1924] 2 Ch 329.

91 "Law of Contract: The Parol Evidence Rule" (No 154), Law Commission (Cmnd 9700, 1986), para 2.17.

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### Express terms

It is the contract itself, which is critical in determining the parties' obligations. In extreme cases the charter may comprise the contract or may be held to be incorporated as discussed above. Although unusual,<sup>92</sup> in some cases, the parties may agree to express terms of performance in good faith or obligations "to deal fairly and...of mutual cooperation".<sup>93</sup> An example is clause 1A(1) of GC/Works/1 (1998):

"The Employer and the Contractor shall deal fairly, in good faith and in mutual co-operation, with one another and the Contractor shall deal fairly, in good faith and in mutual co-operation, with all his sub-contractors and suppliers."<sup>94</sup>

The impact of such express contract provisions on the obligations of the parties to a partnering agreement needs to be considered further. A concern often expressed is that such provisions could result in a fundamental change to the way in which the parties are required to treat each other.<sup>95</sup> This investment by the parties is an aspect of the normative setting in which the contract has been made and will govern the parties' reasonable or legitimate expectations.<sup>96</sup>

In the context of such express terms in a partnering contract or binding charter there would appear to be general support for these to be upheld to prevent opportunistic behaviour by parties.<sup>97</sup> An example would be the use/operation of termination clauses. The more difficult question is the extension of this principle to positive assistance which goes beyond general responsibilities of honesty or fair dealing. It is the extent to which there should be a more onerous duty, requiring one person to act in the interests of another, that the courts have been grappling with.<sup>98</sup>

Butcher, Helps and Critchlow consider that such express terms would impact on the interpretation of other contract provisions and could result in enhanced obligations of co-operation being placed on the parties.<sup>99</sup> Where these are incorporated, it is desirable for business efficacy (to ensure the effective operation of the *collaborative* agreement), or at the very least for

92 Often, standard forms of construction contract are used as a basis, with some being heavily amended and at variance with a harmonious long-term relationship. See R Klein, "Partners and Contracts" (1998) *Building* 9 April p 34; A Minogue, "Partners and Contracts" (1998) *Building* 9 April, p 34.

93 M Latham *supra*, note 10 at p 37. An example Partnering Charter used by Anchor Trust Housing Association (1999) includes a specific obligation of "good faith and fairness in all matters concerning the Project" and this is incorporated into the modified JCT Standard Form of Building Contract 1980, With Quantities.

94 Property Advisers to the Civil Estate, GC/Works/1 With Quantities (1998), HMSO, London. See also Cl 10.1 of the Engineering and Construction Contract (ECC): "[the] Employer, the Contractor, the Project Manager and the Supervisor shall act as stated in the contract and in a spirit of mutual trust and co-operation". The Institution of Civil Engineers (1995) *The Engineering and Construction Contract (ECC)*, Thomas Telford Services Ltd, London.

95 T Butcher *supra*, note 17 at pp 81-82.

96 R Brownsword "Good Faith in contracts revisited" in MDA Freeman with R Halson (Eds), *Current Legal Problems* (1996) Vol 49, Part 2, OUP, Oxford, pp 111-157 at p 125.

97 McKenna & Co "Partnering and the duty of good faith"(1997) *In-House Lawyer*, 48 (March) 56.

98 Carter and Furmston *supra*, note 74 at p 6.

99 *Supra*, note 17.

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ensuring the intentions of the parties, that they are upheld by the courts and given true meaning. Indeed, it seems arguable that good faith should be treated as a rule rather than the exception in such circumstances.<sup>100</sup> And so, in construing the meaning of the contract, the courts should recognise and adopt a good faith regime.<sup>101</sup>

Good faith as the rule therefore is consistent with the concept of co-operative dealings and demands respect for a party's legitimate interests.<sup>102</sup> How far this should extend is for the courts to determine in the circumstances but it is unlikely that this should be as broad as a fiduciary duty, which denies the right to act self-interestedly.<sup>103</sup> A constraint on self-interest is more likely to be the result.

In this context, express provisions to use "best efforts", "best endeavours" or similar terms akin to good faith have been validated by the courts<sup>104</sup> with the extent of the duty being a matter of construction. Normally, this is measured by requiring only those steps which a prudent person would take self-interestedly. How then might such provisions as "to deal fairly in good faith and in mutual co-operation"<sup>105</sup> be interpreted? Such an obligation might place a restraint on opportunistic behaviour or self-interest, which is clearly in bad faith as indicated above. However, might this be extended further to require best endeavours for not merely individual self-interest but joint or mutual self-interest. In other words, there is mutual benefit in the operation of partnering or essentially co-operative contracts. If best endeavours are required then surely, in this context, the steps taken should be what a prudent person would take in mutual self-interest. The critical question however is one of certainty and for some it is argued that such provisions lack this critical ingredient.<sup>106</sup> As a consequence, care needs to be taken in the drafting of express duties of good faith to ensure that they are capable of certainty and reflect the parties' reasonable expectations.

Consequently, whether an express term of good faith will be upheld will depend on the precise wording of the term and whether the courts can determine with certainty the reasonable expectations of the parties from the contractual matrix and surrounding circumstances. It is suggested that a term such as that contained in GC/Works/1 1998,<sup>107</sup> is capable of being

100 R Brownsword, "Two Concepts of Good Faith" (1994) 7 *Journal of Contract Law*, No 3, September, 197 at p 212.

101 Brownsword *supra*, note 44.

102 Brownsword *supra*, note 100.

103 McKenna & Co *supra*, note 97.

104 See for example *Hospital Products Ltd v. United States Surgical Corp* (1984) 156 CLR 41; *Re Anglo-Russian Merchant Traders Ltd* [1917] 2 KB 679; *Colonial Import-Export v. Loumidis Sons* [1978] 2 Lloyd's Rep 560; *Monkland v. Jack Barclay Ltd* [1951] 1 All ER 714; JCT Standard Form of Building Contract 1980 clause 25.

105 GC/Works/1 (1998) Contract for Building & Civil Engineering Major Works, *Model Forms and Commentary*, HMSO, London, at clause 1A(1).

106 *Walford v. Miles* [1992] 2 AC 128; *Coal Cliff Collieries Pty Ltd v. Sijehama Pty Ltd and Another* (1991) 24 NSWLR 1; *Pitt v. PHH Asset Management Ltd* [1993] 4 All ER 961; *Australia Media Holdings Pty Ltd and Others v. Telstra Corp Ltd and Others, Australia Media Holdings Pty Ltd and Others v. News Corporation Ltd* (1998) 43 NSWLR 104; *Courtney & Fairburn Ltd v. Tolaini Brothers (Hotels) Ltd* [1974] 1 WLR 297.

107 GC/Works/1 *supra*, note 105.

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enforced in both a negative and positive way, given the precedents reviewed. From a negative perspective, the operation of the contract termination provisions, condition 56, would be subject to the Condition 1A(1) good faith requirement. Although this permits termination by the employer under a wide range of circumstances, the use of this power might be required to be exercised in good faith, i.e. not in bad faith.<sup>108</sup> Wallace suggests that this would be a valuable way of applying good faith theories in English Law, to mitigate against unreasonable or opportunistic behaviour by parties in the exercise of such powers.<sup>109</sup> This proposition accords also with the GC/ Works/1 (1998) Commentary, which suggests that:

"All parts of the Contract must be read against the background of this Condition. It will not be sufficient for a party to apply the letter of the Contract, if this would amount to sharp practice or

obstructionism. It would be reasonable to expect any such action to count against the responsible party if reviewed by adjudicators and arbitrators in the context of disputes under Conditions 59... and 60...<sup>110</sup>

Whilst this Commentary is of interest for the interpretation of clause 1 A(1), it may be no more than theoretical, as the document specifically states that the commentary does not form part of, and shall not affect the interpretation of, any contract. However, the meaning given to good faith is similar to its practical meaning in other jurisdictions, that is the opposite of bad faith, and as such is consistent with the view that such an express provision should be at the very least interpreted to restrict opportunistic or bad faith behaviour. To illustrate, McKenna & Co have suggested that under a partnering arrangement containing an express duty of good faith, it seems inevitable that the courts would uphold the provision for example in relation to abuse of the express termination provisions by the employer.<sup>111</sup> This may be of particular relevance should the employer under GC/Works/1 (1998) seek to determine the contract under condition 56(8), where the employer may determine "at will" by notice to the contractor, without any ground for determination having arisen. Moreover, in the context of use of this standard form by a public client, it is possible that, as in *Timeload*, the obligations in relation to fair dealing might be more stringently applied because of the relative bargaining position of the parties and the onus on public responsibility.

Whether the good faith provision will impact in a more positive way is less certain. Certainly, similar (but less specific) provisions in the Engineering and Construction Contract are not considered to be enforceable to this

108 McKenna & Co *supra*, note 97.

109 IND Wallace *supra*, note 34 para 12-030 at p 1264.

110 GC/Works/1 *supra*, note 105 at p 70.

111 McKenna & Co *supra* note 97; Landsberg & Megens *supra*, note 11 at p 192.

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extent.<sup>112</sup> Consider, however, condition 36(6) of GC/Works/1 (1998) which states that:

"The Contractor must endeavour to prevent delays and to minimise unavoidable delays, and to do all that may be required to proceed with the Works. The Contractor shall not be entitled to an extension of time where the delay or likely delay is, or would be, attributable to the negligence, default, improper conduct or lack of endeavour of the Contractor."

In the determination of what steps the Contractor should take, how far would a good faith obligation extend? Certainly, it might be reasonable to restrict obstructive behaviour or failure to take any action, but so might condition 36(6). What if the contractor has used some endeavour but had not gone as far as to do all that may be required? Objectively, it could be argued that they had taken the steps of a prudent person acting self interestedly but would that be sufficient here? If the contractor could have changed the method of working to accelerate the works and reduce the delay, but at a cost and some considerable reworking of the programme, should this have been undertaken?<sup>113</sup> In the spirit of conditions 1 (A) (1) to (3), it would seem reasonable for the contractor to be under an obligation to seek alternative "solutions which will, so far as possible, be to the benefit of all affected".<sup>114</sup> Whilst this may be expected of the contractor, equally, similar obligations regarding valuation of expenses incurred by the contractor might be expected of the employer.<sup>115</sup>

However, the existence of a partnering agreement or charter in addition to an express term such as this would provide further evidence of the circumstances of the commercial relationship. Unless the charter is expressly stated as being not intended to have legal effect, it is likely to provide further evidence of the parties' reasonable expectations (as to co-operation for example). Thus, "the requirement can be related to the intentions or expectations of the parties and, in this sense can be viewed as a mutually agreed (self-imposed) constraint on the pursuit of self-interest".<sup>116</sup> It is not beyond consideration that, in such circumstances, more extensive obligations of positive co-operation might reasonably be expected and enforced.<sup>117</sup> In circumstances where the partnering charter itself has been made as a binding agreement, then it is argued that this will result in the courts looking positively at good faith obligations, subject to certainty and consistency between the charter and any subsequent project-specific contracts.

112 See the ECC position: DL Cornes, "The Second Edition of the New Engineering Contract" [1996] ICLR 97; A Cox and I Thompson, "Is the NEC going to succeed? An Examination of the Engineering and Construction Contract (Alias the NEC 2nd Edition)" [1996] ICLR 327; A Mannings, "What is the scope, meaning and effect of clause 10.1 of the ECC?" MSc course paper (1998) Leeds Metropolitan University.

113 *British Westinghouse Electric and Manufacturing Co Ltd v. Underground Electric*

*Railways Co of London* [1912] AC 673 per Viscount Haldane LC, pp 688–689.

114 GC/Works/1 *supra*, note 105, condition 1 (A) (3).

115 *Ibid.*, condition 43(1).

116 Brownsword *supra*, note 100 at p 199.

117 Critchlow *supra*, note 13.

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In an attempt to avoid such a situation, occasionally parties incorporate partnering objectives or principles in the recitals of a contract. Critchlow and others adopt this approach to record the general sentiment of partnering and combine this with a partnering charter.<sup>118</sup> The intention is to minimise the risk of enhanced obligations that might arise if these were operational express terms. However, whilst the intention is to avoid obligations being enforced, in certain circumstances, where the express terms are ambiguous, the recitals will be used to discover the intentions of the parties. This can lead to the imposition of obligations which can be inferred from the recitals: "When words of recital...manifest a clear intention that the parties should do certain acts, the courts will from these infer a covenant to do such acts, just as if the instrument had contained an express agreement to that effect."<sup>119</sup>

Given that the surrounding circumstances normally will include a partnering charter containing similar mutual objectives, there is the potential at least for the imposition of enhanced obligations of good faith (where the charter does not include an express statement to be non-binding). However, where the meaning of the express terms of the contract are clear, the recitals will prove ineffective as a control mechanism.<sup>120</sup>

### Implied terms

In the absence of express terms of good faith in the contract, whether good faith obligations will be upheld is less certain.<sup>121</sup> In this respect, the agreement will be construed by the courts according to classical principles consistent with the reasonable expectations of the parties. To the extent that a good faith obligation is upheld, it will arise not as a rule, but as an exception.<sup>122</sup>

The implication of obligations of good faith in partnered construction contracts is dependent therefore on both the express terms of the contract and the way in which the contract is construed. In construction contracts, the courts are willing to impose extensive implied terms that are consistent in approach with good faith general principles in other jurisdictions.<sup>123</sup> However, the implication of an express good faith obligation, particularly one of a positive nature, has been more difficult to establish. Whilst more recently, support has been expressed for a shift towards the implication of

118 *Ibid.*, at pp 8 and 55.

119 AG Guest *Chitty on Contracts* 27th edn (1994) Vol 1 General Principles, Sweet & Maxwell, London, at pp 630 and 587.

120 *Ibid.*, at p 587.

121 Critchlow *supra*, note 13; Butcher *supra*, note 17; Helps *supra*, note 17; Landsberg and Megens *supra*, note 11 at p 187.

122 This exception models accords with one of restrained self-interest in which "the general rule licenses contractors to deal in a wholly self-interested manner and in which a party's legitimate interests function as constraints on the licensed pursuit of self-interest". See Brownsword *supra*, note 100.

123 Bingham LJ in *Interfoto Picture Library Ltd v. Stiletto Visual Programmes Ltd* (1989) *supra*, note 26 at p 439; J Steyn, "The Role of Good Faith and Fair Dealing in Contract Law: A Hair Shirt Philosophy?". *The Denning Law Journal* (1991) 131; Colledge *supra*, note 27.

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explicit good faith obligations where the circumstances support this,<sup>124</sup> equally, there have been rejections of the imposition of such an obligation even in circumstances where the contract contains an express term of good faith.<sup>125</sup> Consequently, issues of certainty as to reasonable

expectations, the nature of the contractual relationship, the background to the contract, and the relative nature of the parties<sup>129</sup> are of critical importance in assessing whether such terms will be implied.

If these issues are applied to partnering of construction contracts, the conclusion emerges that obligations of good faith are likely to be upheld only given the right circumstances. Any implication of a good faith requirement will of necessity take account of the transactional setting that exists. Of particular significance here is the philosophy of partnering, which requires commitment to the ideals of co-operation, trust and fairness. Certainly, in respect of negative obligations, the courts would appear to be willing already to uphold these principles implicitly.<sup>130</sup> In doing so, they make reference to general standards of honesty,<sup>131</sup> fair dealing<sup>132</sup> and reasonableness<sup>133</sup> to determine abuse or otherwise of discretionary powers.<sup>134</sup> The existence of a partnering charter provides further evidence of the background to the contract and together would suggest enhanced expectations between the parties. Furthermore, the nature of the parties themselves may have an impact upon the imposition of obligations, with the weaker parties being protected by the courts from opportunism by the stronger party.<sup>135</sup> This may be of particular relevance where the partnering arrangement is between a contractor and sub-contractors.

Here also, there is potential for the influence of prevailing statutory standards to influence the objective standard of action required between the parties if the proposition by Bingham LJ in *Timeload* is followed<sup>136</sup> :

"It seems to me at least arguable that the common law could, if the letter of the statute [Unfair Contract Terms Act 1977] does not apply, treat the clear intention of the

124 *Renard Constructions v. Minister for Public Works* (1992) *supra*, note 30; *Timeload Ltd v. British Telecommunications plc* (1995) *supra*, note 37; *Philips Electronique Grand Public SA v. British Sky Broadcasting* (1995) *supra*, note 43.

125 *Supra*, notes 59 and 63.

126 In the absence of certainty, contractual freedom will be upheld; *supra*, notes 63 and 65.

127 Where the class of contract may warrant the implication of a term.

128 Such as prevailing community standards of honesty or fair dealing, and the inescapable background circumstances.

129 Such as bargaining power or accountability of a public company; *supra*, note 66.

130 *Supra*, note 27.

131 *Neodox Ltd v. Borough of Swinton and Pendlebury* (1958) 5 BLR 34.

132 *Tillmanns & Co v. SS Knutsford Ltd* [1908] 2 KB 385 per Farwell LJ at p 406; *Interfoto Picture Library Ltd v. Stiletto Visual Programmes Ltd* (1989) *supra*, note 26 at p 439.

133 *Abu Dhabi National Tanker Co Ltd v. Product Star Shipping Ltd (The Product Star) (No 2)* (1993) 1 Lloyd's Rep 397 per Leggatt LJ at p 404; *Renard Constructions v. Minister for Public Works* (1992) *supra*, note 30; *Hughes Bros Pty Ltd v. Trustees of the Roman Catholic Church for the Archdiocese of Sydney* (1993) 31 NSWLR 91.

134 See also J Beatson, "Public Law Influences in Contract Law" in J Beatson and D Friedmann, *Good Faith and Fault in Contract Law* (1995) Clarendon Press, Oxford.

135 See for example *Timeload supra*, note 37; *supra*, note 66.

136 *Supra*, note 37.

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legislature expressed in the statute as a platform for invalidating or restricting the operation of an oppressive clause in a situation of the present, very special kind."<sup>137</sup>

Ultimately, the statute in this case was held to be applicable so this issue was left unresolved. However, whether good faith obligations will be imported into construction contracts in this manner is at best speculative. Certainly, whilst there is no specific legislation in English law relating to a general duty of good faith (such as the codes in the United States or France, Germany or Italy) basic principles of fairness or fair dealing have been part of our system. Hence, there is the Sale of Goods Act and Supply of Goods and Services Act, which provide basic implicit good faith obligations. There is the Unfair Contract Terms Act and the Unfair Terms in Consumer Contract Regulations,<sup>138</sup> which again establish these basic implicit doctrines. Indeed, it is evident that more recently, the influence of codified law principles has been pervading English law through European Community legislation.

Whether this will eventually move to the establishment of general good faith obligations is yet to be seen. However, the ongoing development of common principles for a European legal framework suggests that it is only a matter of time before express statutory obligations will be a requirement. This trend in protection is evident in consumer legislation and may form part of any



more general commercial dealings in the future. For example, the European principles contain express provisions relating to good faith and define this as "honesty and fairness in mind" and "fair dealing".<sup>139</sup>

Further, in the construction field, the introduction of the Housing Grants, Construction and Regeneration Act 1996<sup>140</sup> (the HGCR Act) is an extraordinary government intervention to regulate the actions of parties to construction contracts as a direct result of extensive concerns regarding unfairness and lack of trust in the industry. The Latham Report<sup>141</sup> and, more recently, the Egan Report<sup>142</sup> have highlighted the complexity of the industry and the failure of present procurement processes to regulate these complex relationships effectively. At present, the legislation is limited in remit to payment and adjudication provisions on specific types of construction contract. However, it is indicative of a trend that should not be ignored. The government's consultation paper prior to the HGCR Act, "Fair Construction

137 As per Bingham LJ *supra*, note 37.

138 See for example the definition of an unfair term: "any term which contrary to the requirement of good faith causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer", in R Harrison, *Good Faith in Sales* (1997) Sweet & Maxwell Ltd, London at p 713.

139 O Lando and H Beale (eds) *Principles of European Contract Law –Part 1: Performance, Non-Performance and Remedies*, (1995) Commission on European Contract Law, Martinus Nijhoff, Dordrecht; MO de Zylva "Towards a Common Law: The Difficulty of Harmonising International Construction" (1997) *Construction Law Journal*, Vol 13, No 2, 107.

140 Housing Grants Construction and Regeneration Act 1996, HMSO.

141 Sir M Latham, *Constructing The Team* (1994) HMSO.

142 J Egan, The Report of the Construction Task Force *Rethinking Construction* (1998) Department of the Environment, Transport and the Regions, London.

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Contracts",<sup>143</sup> made reference to Latham's list of principles for modern construction contracts that started with the principle that all parties to a construction contract should be under "A specific duty...to deal fairly with each other, and with their subcontractors, specialists, and suppliers, in an atmosphere of mutual co-operation".<sup>144</sup>

The government in 1995 was prepared to consider legislation if the need for it was adequately demonstrated, if there was broad support for it throughout the industry and among clients and if it could be given practicable legislative effect. Consequently, there was extensive consultation on whether legislation (a radical step) should be introduced. The outcome was the HGCR Act which embodied some but not all of Latham's principles and excluded the general "good faith" principle. What is important is that the industry and the class of contracts therein have been singled out for legislative intervention because of their special type and that there is recognition of a need for good faith principles including the use of partnering. This provides a circumstantial background to partnering of construction contracts that may be relevant in determining the nature of any community expectations of fair dealing.<sup>145</sup> Equally, whether in the future this will lead to further legislative intervention, such as a good faith obligation, is mere speculation. It seems doubtful that an industry would be singled out in this way. However, it has occurred with insurance, for similar reasons, when a need for protection was perceived. It is therefore not inconceivable that another industry, such as construction, might be identified in the future. In Australia, in relation to an implied duty of good faith, Priestly in *Renard Constructions*<sup>146</sup> has already singled out construction for special treatment. The class of contract (a typical construction contract) warranted the imposition of an implied term in law.

Similarly, as is suggested in *Timeload*,<sup>147</sup> there may be a move towards the implication of such obligations as a matter of law given the nature of such contracts.

However, above all is the requirement that the reasonable expectations of the parties can be determined with some certainty, otherwise there is a reliance on upholding contractual freedom. This is particularly relevant in relation to the imposition of positive good faith obligations such as co-operation or disclosure of information. The difficulty is in establishing the degree of assistance required or the extent to which parties are required to have regard to the legitimate interests of each other.

With regard to implied terms of co-operation, it is well established that an

143 Construction Sponsorship Directorate, *Fair Construction Contracts* (1995) May, Department of the Environment.

144 Sir M Latham *supra*, note 141 at p 37.

<sup>145</sup> See for example Bingham LJ in *Timeload Ltd v. British Telecommunications plc supra*, note 37.

<sup>146</sup> *Renard Constructions v. Minister for Public Works supra*, note 30.

<sup>147</sup> *Timeload Ltd v. British Telecommunications plc supra*, note 37.

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obligation not to hinder or prevent will be upheld by the courts.<sup>148</sup> More difficult, however, is the implication of a positive duty to assist. Whilst in *London Borough of Merton v. Leach*<sup>149</sup> a duty to the employer to "take all steps reasonably necessary to enable the contractor to discharge their obligations" was upheld, this is normally tempered by the interpretation that these mean steps which are within its power to take.<sup>150</sup> Thus, there is the obligation to ensure that the employer's representative performs the duties set out in the contract<sup>151</sup> or access is given in accordance with the contract dates,<sup>152</sup> but a broader facilitative obligation is more difficult to establish.<sup>153</sup>

Similarly, an implied term that a contractor owed to the employer an obligation of trust and confidence analogous to that owed by employee to employer has not been upheld.<sup>154</sup> The term was deemed too imprecise to be implied into what was a carefully drafted four-year maintenance contract. Furthermore, Dyson J stated, "It might be argued that there was more justification for implying a term of trust and confidence in a complex construction contract than in a maintenance contract of [this] type".<sup>155</sup> Similar issues have arisen in relation to the enforcement of express provisions for negotiation in good faith with such terms being held to lack certainty of meaning.<sup>156</sup> In *Phillips Petroleum Co UK Ltd v. Enron Europe Ltd*,<sup>157</sup> an obligation to "use reasonable endeavours to agree" was not deemed to be restricted to technical or operational practicality when deciding how to discharge the obligation. A key factor here was that no guidance had been provided on the interpretation of the term. Sir John Balcombe (dissenting) disagreed however, and considered that the result (which allowed as valid, refusal to agree for selfish or commercial motives) was unfair and ran counter to the reasonable expectations of honest men. It might be argued that had this agreement contained an express good faith provision, that it should be restricted to Sir John Balcombe's meaning. But, as has been seen, it is often difficult for the meaning to have sufficient clarity for this to occur. One option is for the parties to include in the contract some criteria or explanation as to meaning in order to inform the courts as to what was intended. Because, where there is no single preferred outcome which can be determined as within the parties' reasonable contemplation, the provisions

<sup>148</sup> *Mackay v. Dick* (1881) 6 App Cas 251; *London Borough of Merton v. Leach* (1985) 32 BLR 51; *Allridge (Builders) Ltd v. Grandactual Ltd* [1997] CILL 1219-1228, *Bernhard's Rugby Landscapes v. Stockley Park Consortium* [1998] QBD (OR) Transcript, 79.

<sup>149</sup> *London Borough of Merton v. Leach* (1985) 32 BLR 51.

<sup>150</sup> *Perini Corp v. Commonwealth of Australia* (1969) 2 NSWLR 530; 12 BLR 82; *Allridge (Builders) Ltd v. Grandactual Ltd* [1997] CILL 1219-1228.

<sup>151</sup> *Perini Corp v. Commonwealth of Australia* (1969) 2 NSWLR 530, 12 BLR 82.

<sup>152</sup> *Jardine Engineering v. Shimizu* (1992) 63 BLR 96.

<sup>153</sup> *Bernhard's Rugby Landscapes v. Stockley Park Consortium* [1998] QBD (OR) Transcript, as per His Honour Judge Humphrey LLOYD QC at p 79.

<sup>154</sup> *Bedfordshire County Council v. Fitzpatrick Contractors Ltd* [1998] CILL 1433-1444.

<sup>155</sup> *Ibid*, at p 1441.

<sup>156</sup> *Walford v. Miles* [1992] 2 AC 128.

<sup>157</sup> *Phillips Petroleum Co UK Ltd v. Enron Europe Ltd* [1997] CLC 300; (1997) *Building Law Monthly*, 10.

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are likely to be void for uncertainty or the reasonable, narrower standard of fair dealing or honesty will be implied (as the current approach to upholding implicit good faith obligations).

To give one further illustration, consider a JCT 80<sup>158</sup> construction contract with a contiguous partnering agreement and charter containing the following provisions.<sup>159</sup>

**"AMENDMENTS TO JCT 80 CONTRACT EXTRACTS:****New Article:**

'This Contract is entered into pursuant to a Partnering Agreement dated the same day as this Contract concluded between the Employer and the Contractor (the "Partnering Agreement") and the Parties expressly acknowledge that in all matters relating to the performance of the Parties' obligations under this Contract they will adhere to the terms and spirit of the Partnering Agreement and that without limitation the following provisions of the Partnering Agreement will be construed together with the relevant provisions of this Contract:'

**The Partnering Agreement Extracts:**

'The Projects are to be undertaken by implementation of a Partnering Relationship (for which the Partnering Charter is set out in Schedule X) between the Employer and the Contractor and with participation of [the Projects Team] in order to achieve:

- trust, dedication to common goals, understanding of each other's expectations and values;
- good faith and fairness in all matters concerning the Projects;
- ...completion of Projects, all in accordance with the Pre-Contract Programme... and the agreed Cost Framework...; ...

efficient and cost-effective delivery of Project management to achieve minimum achievable resident disruption and compliance by the employer with its Contract with tenants, ...applying lessons learned on earlier projects.'

**The Partnering Charter Extracts:**

'...to achieve the following goals during the life of the project:

- Complete the works for the client within the project budget.
- Complete the works to the agreed programme.
- Develop a Teamworking approach and make partnering work by aiming to remove the traditional client/contractor conflict, by creating an environment based upon respect, trust and open communication.
- Enable the contractor to maintain a positive cash flow and achieve reasonable profitability.
- Implement a procedure to jointly solve problems.
- Encourage alternatives such as a share in cost savings without impairing the [Charter] objectives."

158 JCT Standard Form of Building Contract 1980, Private Edition with Quantities, with amendments 1-18.

159 Extracts from contract documents, partnering agreement and partnering charter between a UK Housing Association and a contractor, March 1999.

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It is interesting to speculate as to the likely impact (if any) such provisions might have on implied obligations of co-operation. From a "restraint" perspective, there would appear to be no difficulty in upholding an obligation not to hinder or prevent. From a "positive assistance" angle, it could be construed that the scope of an implied obligation to take all steps reasonably necessary has been extended to include for example, consideration of joint solutions to problems, maximisation of joint gain rather than individual benefit, or enabling the works to be completed so as to facilitate a positive cash flow for the contractor. Although there is still a difficulty in determining the precise meaning of such provisions, it is suggested that account should be taken of the attempts by the parties to establish a contractual relationship which is different from a traditional relationship under a JCT standard form. The aim should be to give effect to the intentions of the parties as might be determined from their agreement. In such circumstances, the enforcement of good faith obligations should be consistent with these objectives.

**CONCLUSIONS**

The philosophy of partnering is of a relationship based on co-operation and trust. This mutual interdependence creates an environment in which the parties' expectations of each other are heightened and differ markedly from construction contracts where partnering is absent. This is demonstrated by the commitment to a partnering charter that seeks to define mutual objectives to which all parties subscribe. It is as a consequence of these mutual expectations that good faith obligations may arise either as express contract provisions or implied by fact or law. It is apparent that explicit good faith obligations are more likely to be upheld in circumstances where the contract contains express good faith provisions or where there is a partnering charter (if not restricted expressly in its legal scope). This may arise as a result of a project-specific relationship or as a result of raised expectations arising in the course of previous dealing (for example, in strategic partnering arrangements). In cases of negative obligations, these are likely to be upheld more readily given the benchmarks available as criteria to determine reasonable expected standards of behaviour. Positive obligations will demand additional attention to the factual circumstances in order to determine how far such obligations should extend or whether they should be imposed at all. The focus of the courts appears to be on the preservation of freedom to contract although restraints are placed on the parties' behaviour in circumstances where this contravenes general standards of honesty or fair dealing.

Whether good faith obligations will extend beyond a narrow definition of honesty and fair dealing will depend on the circumstances in each case. It is easier for the courts to determine such objective standards in relation to

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protection of one party from the self-interested or opportunistic behaviour of another. This is apparent from the current approach to upholding implicit good faith obligations in construction contracts. However, it is more difficult to establish in relation to positive duties that go beyond those reasonably necessary to enable the contract to be performed. Such obligations go to the very heart of the business relationship and are expected to be determined by the parties in their negotiations. Thus, the courts normally would not expect positive action by a party which necessitated significant financial outlay if this was not clearly expected from the contract.<sup>160</sup> In reality, it may be that explicit recognition of such obligations may not extend beyond "fair and open dealing" as identified by Bingham LJ<sup>161</sup> and O'Connor.<sup>162</sup>

However, it is suggested that where it is clear that the parties have subscribed to mutual objectives and co-operation such as in a partnering context, mutual support or assistance of a kind which goes beyond traditional contracting norms would be within the parties' reasonable expectations. Quite how far this might extend is a matter of interpretation of the circumstances and the facts, but it is argued that a minimum expectation of fair and open dealing would be applied. This may be no greater than the existing implicit obligations evident in construction contracts but it would result in a more explicit recognition of good faith by, securing faithfulness to the agreed common purpose, achieving consistency with the justified expectations of the other party, and through compliance with community standards of decency, fairness or reasonableness.<sup>163</sup>

<sup>160</sup> See for example the duty of disclosure of information where this might be expected to be provided only if the information exists or it is not too costly to obtain.

<sup>161</sup> *Interfoto Picture Library Ltd v. Stiletto Visual Programmes Ltd* [1989] 1 QB 433, as per Bingham LJ at p 439.

<sup>162</sup> J F O'Connor, *Good Faith in English Law*, (1990) Dartmouth Publishing Company Ltd, Aldershot, at p 102.

<sup>163</sup> The stated purpose of a good faith requirements in the Restatement (Second) of Contracts, s 205 comment a (1979).

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